2016 IL App (1st) 151990-U

FIRST DIVISION
January 15, 2016

No. 1-15-1990



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| SEAN O'HALLERAN, | ) | Appeal from the |
| | ) | Circuit Court of |
| Petitioner-Appellant, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 D 081040 |
| | ) | |
| CATHLEEN ANNE HARDER, | ) | Honorable |
| | ) | Daniel R. Degnan, |
| Respondent-Appellee, | ) | Judge Presiding. |

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PRESIDING JUSTICE LIU delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

**O R D E R**

¶ 1 *HELD*: Order restricting father's parenting time vacated where: (1) the circuit court imposed the restriction after expressly finding no threat of serious endangerment to the child, and (2) the court exceeded its jurisdiction by imposing the restriction *sua sponte*, in the absence of a pending petition or justiciable controversy.

¶ 2 Sean O'Halleran and Cathleen Harder are the natural parents of RO-H, a nine-year-old girl. The parties, who were never married to each other, shared joint custody of their daughter. Beginning in 2014, the parties filed multiple emergency petitions seeking to restrict the parenting

time of the other. At various times pending the disposition of these petitions, the circuit court entered interim orders that restricted each of the parties' parenting time[1] with RO-H. In 2015, after the court had vacated the interim restrictions and reinstated the parties' joint custody arrangement, Cathleen filed another petition for emergency relief. Following a hearing, the court dismissed the petition, but determined that, in the best interests of RO-H, Sean's parenting time had to be supervised by a therapist. During a follow-up status hearing on July 8, 2015, the court entered an order limiting Sean's custodial time with his daughter to therapist-supervised visits. Sean sought an interlocutory appeal of the July 8, 2015 order. Upon review, we find that the circuit court erred in imposing the restriction. Therefore, we vacate the July 8, 2015 order.

¶ 3 First, the court applied the wrong legal standard by considering only the best interests of RO-H; instead, the court was required to first determine, as a threshold finding, that unsupervised parenting time with her father would seriously endanger RO-H's physical, mental, moral, or emotional health. Here, the court imposed a restriction on Sean's parenting time after it expressly found that there was *no* risk of serious endangerment to RO-H. Second, the court exceeded its jurisdiction by imposing the restriction *sua sponte* after disposing of the parties' only pending motions.

¶ 4 BACKGROUND

¶ 5 This matter was first initiated on December 23, 2009, when Sean sought joint custody of RO-H. On August 23, 2013, the circuit court entered the Amended Joint Parenting Agreement and Custody Judgment (the Amended Custody Judgment) upon agreement of the parties. The Amended Custody Judgment provided for the parties' joint legal custody of RO-H (with each parent being granted equal routine, holiday, and vacation parenting time). The order also

[1] Because the parties shared joint custody of RO-H, their respective time with her may more accurately be characterized as "parenting time," rather than "visitation." In their briefs, the parties use both terms and, for purposes of this order, we consider them to be interchangeable.

required the parties to undergo weekly psychological counseling for a period of at least one year, and required Cathleen to submit for a period of time to random drug and alcohol testing.

¶ 6 A. The 2014 Petitions for Emergency Relief

¶ 7 In the second half of 2014, the parties filed several emergency petitions seeking to restrict each other's parenting time with their daughter.

¶ 8 In June 2014, Sean filed an emergency petition seeking to suspend Cathleen's parenting time. He claimed that Cathleen failed to meet the Amended Custody Judgment's requirements for random drug and alcohol testing and that she tested positive for alcohol the prior month. The circuit court ordered additional drug and alcohol testing and suspended Cathleen's overnight parenting time, but allowed the existing parenting schedule to otherwise remain intact. Sean then filed an amended emergency petition in July 2014, asking the court to impose supervisory restrictions on Cathleen's time with RO-H. He alleged that Cathleen again tested positive for alcohol and had recently sent him disturbing text messages. The court found a risk of serious endangerment to RO-H, and ordered that Cathleen's time be supervised until further order. The court also ordered Cathleen to undergo mental health and substance abuse evaluations.

¶ 9 In October 2014, Cathleen filed an emergency petition seeking to suspend Sean's parenting time and asking that supervised visitation resume only upon Sean's completion of a mental health evaluation. The circuit court entered an agreed order placing RO-H in the temporary care of Sean's sister (the aunt). A subsequent order additionally required the aunt to supervise each party's visitation with RO-H until further order. The court scheduled a hearing on the issues of "supervised visitation and child endangerment," for February 9, 10 and 11 of 2015.

¶ 10 On February 9, 2015, the circuit court entered four orders resolving all pending issues: (1) an agreed order setting a schedule for the parties to take RO-H to her therapy appointments;

(2) an agreed order requiring the parties to continue seeing their respective psychiatrists and therapists, requiring Sean to attend and complete an anger management program, requiring Cathleen to undergo continued random drug and alcohol testing, terminating supervisory restrictions on both parties' visitation, and ordering the parties to resume the parenting schedule set forth in the Amended Custody Judgment; (3) an agreed order lifting all restrictions on the parties' parenting time with RO-H; and (4) an order continuing the matter for a status hearing regarding compliance. Coinciding with the entry of these orders, the parties withdrew all pending petitions.

¶ 11 B. Dismissal of Cathleen's March 2015 Petition

¶ 12 On March 27, 2015, Cathleen filed another emergency petition seeking to suspend or restrict Sean's parenting time, claiming that he had been physically and verbally abusive toward RO-H. Cathleen described an incident in which Sean allegedly pushed RO-H to the ground and held her down in anger because she cut her hair to remove a stuck comb. In support of her motion, Cathleen submitted an affidavit stating that Sean routinely used physical aggression and physically restrained RO-H whenever he was angry with her. The circuit court entered an order suspending Sean's parenting time until further hearing on the matter.

¶ 13 On March 31, 2015, Sean responded by moving to strike Cathleen's petition, arguing that it was based solely on inadmissible hearsay, *i.e.*, the statements made by RO-H to her teacher (and relayed to Cathleen's counsel by the guardian ad litem (GAL)). Sean further argued that the statements RO-H purportedly made to her teacher were inadmissible pursuant to section 606(e) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/606(e) (West 2012)).[2] He asserted that an exception to the hearsay rule applies under the

[2] Section 14 of the Parentage Act provides that "[i]n determining custody, joint custody, removal, or visitation, [a] court shall apply the relevant standards of the [Marriage Act]." 750 ILCS 45/14(a)(1) (West

Marriage Act only where a child's statements regarding potential abuse or neglect are corroborated by independent evidence.[3] Sean also sought to strike Cathleen's affidavit, contending it was not based on personal knowledge.

¶ 14 The circuit court held a hearing, during which RO-H's teacher was present to testify (thus potentially removing one layer of hearsay), but Sean argued that an evidentiary hearing would only be proper after Cathleen offered some evidence to corroborate RO-H's underlying statements to the teacher. The court agreed and continued the hearing, allowing Cathleen additional time to file an amended motion with evidence corroborating RO-H's statements. The court also set deposition dates for Cathleen, the GAL, and the teacher; and ordered Cathleen and the GAL not to communicate with the teacher prior to the depositions. Cathleen failed to provide any corroborating evidence and, as a result, the depositions were never held.

¶ 15 On May 14, 2015, Sean submitted his own affidavit explaining the alleged incident with RO-H and moved to dismiss Cathleen's petition. In her *pro se* response to the motion to dismiss, Cathleen explained that she was prohibited from contacting RO-H's teacher to obtain an affidavit and claimed that she had previously tendered corroborating evidence to her lawyer, but the lawyer withdrew before filing an amended motion on her behalf. Cathleen argued that the statements RO-H made to her teacher fell within the present sense impression exception to the rule against hearsay, because RO-H was attempting to discuss her then existing mental,

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2012). The Marriage Act thus applies equally to proceedings concerning issues of custody and visitation for a child whose parents, like Sean and Cathleen, were never married.

[3] We note that section 606(e) of the Marriage Act creates an exception to the rule against hearsay for *all* statements made by a child relating to any allegations that the child was abused or neglected, not just for statements that are corroborated by extrinsic evidence. 750 ILCS 5/606(e) (West 2012). The statutory language, "[n]o such statement, however, if uncorroborated and not subject to cross-examination, shall be sufficient *in itself* to support a finding of abuse or neglect" (emphasis added) (750 ILCS 5/606(e) (West 2012)), does not bar the admission of RO-H's uncorroborated statements; it merely precludes a finding of abuse or neglect based solely on the uncorroborated statements.

emotional, or physical condition. Cathleen also requested that the statements made by the GAL and teacher be admitted as statements of trustworthy witnesses with no bias or, alternatively, that she be permitted to communicate with the teacher to secure an affidavit.

¶ 16 On June 29, 2015, the parties presented their respective arguments at a lengthy hearing. Cathleen explained that she had unsuccessfully reached out to the school district to ask RO-H's teacher to attend the hearing. She asked for more time to provide corroborating evidence and to be permitted to contact the teacher directly for an affidavit. Objecting to the request for additional time, Sean argued that there was still no evidence corroborating RO-H's alleged statements to her teacher, regardless of Cathleen's ability to obtain an affidavit from the teacher.

¶ 17 After considering the parties' arguments, the circuit court granted Sean's motion to dismiss Cathleen's emergency petition, finding that Cathleen had failed to present corroborating evidence despite multiple opportunities to do so. The court then addressed its concern that many months had passed since RO-H and her father had been alone together, noting that Sean had refused to see RO-H under the supervised visitation terms. The court indicated its intent to enter a temporary order requiring that Sean's parenting time be supervised by a therapist. The court explained that the imposed "transitional, therapeutic, [or] reunification therapy" was a temporary measure, with the goal of reinstating full, unsupervised parenting time between Sean and RO-H, as set forth in the Amended Custody Judgment. The court then expressly stated that it found no serious endangerment to RO-H, at which time Sean's counsel objected to the supervision requirement:

> "THE COURT: There is no finding of serious endangerment, but it's in the best interest.
>
> MR. SANDERS: But the statute is absolutely clear on this. You cannot,

under a best interest analysis, order supervised visitation. There has to be serious endangerment. And that is a fundamental statutory -- now, I understand --

THE COURT: I believe I can put restrictions on visitation --

MR. SANDERS: But you cannot put a restriction --

THE COURT: -- based on a best-interest standard.

MR. SANDERS: Yes, but you cannot order supervised visitation --

THE COURT: But I'm ordering them to therapy together."

¶ 18 Sean's counsel agreed that, given what had happened, the circuit court had discretion "to do the transition," noting that "a couple weeks" or "a few visits to kind of get them back together again" with RO-H's therapist "would be appropriate." He urged the court to set a relatively quick timetable for reinstatement of full parenting time, however, given that no petition was then pending. The circuit court acknowledged that no petition was pending, stating: "if someone wants to a [sic] file an appropriate petition for me to address modification of visitation, then they should do that." It declined to set a timetable for completion of the therapeutic visitation, however, instead indicating the duration would depend on how the sessions went. It was agreed that Sean would have one visit with RO-H and her therapist that Friday and return for a status hearing to discuss "transitioning [Sean]'s parenting time."

¶ 19 C. The July 8, 2015 Hearing and Order

¶ 20 The single therapeutic visitation session was conducted, and on July 8, 2015, the parties reconvened for a status hearing. At that time, Sean took issue with the report generated by the therapist and presented his prepared argument that the court lacked jurisdiction to impose a supervisory restriction—even a temporary one—on his parenting time where there was no petition before the court seeking such a restriction. Although Cathleen indicated that she was

prepared to file a motion within a half an hour, there is no indication in the record that she did so. At the conclusion of the hearing, the circuit court noted that the concerns leading it to order therapeutic visitation were still present and—reiterating that its ruling was based on the best interests standard—ordered Sean's parenting time be limited to such visits until further notice. The court gave Sean the option of attending an intake session with a therapist recommended by the GAL and scheduled a follow-up status hearing for July 29, 2015. There is no indication in the record whether the intake session was held or whether, in the intervening months, Sean has availed himself of the therapeutic visitation permitted by the circuit court's order.

¶ 21 On July 22, 2015, Sean timely filed his petition for leave to appeal the circuit court's July 8, 2015 order pursuant to Illinois Supreme Court Rule 306(a)(5) (eff. July 1, 2014). We granted the petition on August 10, 2015.

¶ 22 ANALYSIS

¶ 23 Sean contends the circuit court's July 8, 2015 order limiting his parenting time with RO-H to supervised therapeutic visitation should be vacated for three reasons: (1) the circuit court acted without jurisdiction when it imposed the restriction in the absence of any pending petition; (2) Sean was denied due process of law because he was not provided with adequate notice that a restriction would be imposed at the July 8, 2015 hearing; and (3) the circuit court imposed the restriction not only without making a threshold finding that there was a threat of serious endangerment to RO-H, but after specifically finding there was no such threat.

¶ 24 As a preliminary matter, we agree that there was no pending petition to restrict Sean's parenting time at the time of the July 8, 2015 hearing (see *infra*). We disagree, however, with the notion that Sean was not put on notice of the circuit court's intent. To the contrary, the court ended the June 29, 2015 hearing by specifically telling the parties that it intended to issue a

temporary order requiring therapeutic visitation and asking them to provide the names of potential therapists. Nor is Sean's professed belief that the therapeutic visitation would consist only of the single session held the Friday after that hearing a reasonable one, given that Sean's counsel questioned the court about the duration of the proposed restriction, contrasting "a couple of weeks" or "a few visits" (which he indicated might be within the court's discretion and appropriate under the circumstances) with supervised visitation of a longer duration. At that time, the court unambiguously declined to set a timetable for completion of the therapeutic visitation. Furthermore, the record reflects that Sean's counsel was prepared to argue, during the July 8 hearing, that the circuit court lacked jurisdiction to order a restriction *sua sponte* and that it applied the wrong legal standard. We are thus convinced that Sean had ample notice of the court's intent to impose some type of temporary restriction on his parenting time. Notwithstanding our finding that Sean was provided with adequate notice, we agree that the other two errors independently require us to vacate the circuit court's order. We first address the legal standard the court applied in imposing the restriction.

¶ 25 A. Applicable Legal Standard

¶ 26 Sean maintains the circuit court's order must be vacated because the court improperly imposed a restriction on his visitation with RO-H without making the required threshold finding that continued unsupervised visitation would seriously endanger RO-H's physical, mental, moral, or emotional health. For her part, Cathleen appears to argue that the circuit court properly applied the best interests standard. In her view, the court's order did not impose a restriction on petitioner's visitation but instead redefined the "reasonable visitation" petitioner was entitled to under the circumstances, with the goal of eventually reinstating full visitation between RO-H and petitioner.

¶ 27 Section 607(a) of the Marriage Act provides that "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health."[4] 750 ILCS 5/607(a) (West 2012). "[T]he test to determine whether visitation is 'reasonable' is whether the visitation is in the child's best interest." *In re Marriage of Chehaiber*, 394 Ill. App. 3d 690, 694-95 (2009) (citing *In re Marriage of Seitzinger*, 333 Ill. App. 3d 103, 112 (2002)). Section 607(c), however, distinguishes between orders that modify visitation and orders that restrict visitation. "The court may *modify* an order granting or denying visitation rights of a parent whenever modification would serve the best interest of the child." (Emphasis added.) 750 ILCS 5/607(c) (West 2012). Due to parents' inherent right of access to their children and public policy encouraging family relationships, however, a court will only deprive a parent of visitation in extreme circumstances. *In re Marriage of Diehl*, 221 Ill. App. 3d 410, 429. Section 607(c) therefore provides that a "court shall not *restrict* a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral or emotional health." (Emphasis added.) 750 ILCS 5/607(c) (West 2012). This endangerment standard has been described as onerous, stringent, and rigorous." *In re Marriage of Diehl*, 221 Ill. App. 3d 410, 429 (1991). The burden is on the parent requesting the restriction to prove by a preponderance of the evidence that visitation would seriously endanger the child. *Id.*

¶ 28 We will generally not reverse a circuit court's decision concerning changes to a visitation schedule unless it is against the manifest weight of the evidence or an abuse of discretion. *Heldebrandt v. Heldebrandt*, 251 Ill. App. 3d 950, 954 (1993). Whether the circuit court applied

[4] Although the parties in this case are both custodial parents, we find the "visitation" provisions under section 607 of the Marriage Act (750 ILCS 5/607 (West 2012)) applicable here, where both parties rely on them and where courts apply them equally to modify or restrict the time a custodial parent may spend with his or her child. See, *e.g.*, *In re K.E.B.*, 2014 IL App (2d) 131332, ¶¶ 8-9, 31-33 (2014) (applying section 607(c) to review circuit court's restriction of a custodial parent's visitation).

the proper legal standard, however, is a question of law subject to *de novo* review. *In re Estate of K.E.S.*, 347 Ill. App. 3d 452, 461 (2004) (citing *In re Marriage of Sobol*, 342 Ill. App. 3d 623, 627 (2003)).

¶ 29 With respect to its disposition of Cathleen's petition in this case, it is undisputed that the circuit court: (1) expressly found there was no risk of serious endangerment to RO-H; (2) limited Sean's parenting time to therapist-supervised visitation; and (3) did so after applying the best interests standard. The only real issue for our consideration, therefore, is whether the circuit court's order can be seen, as Cathleen urges, as anything other than a restriction on visitation.

¶ 30 Sean directs our attention to *In re Marriage of Lee*, 246 Ill. App. 3d 628, 645 (1993), one of a number of cases stating that an order requiring supervised visitation is a restriction. Cathleen relies on *Chehaiber*, a case in which our sister court extensively considered the difference between a modification and a restriction under section 607(c) and, after reviewing the plain language of the provision, the applicable case law, language used elsewhere in the statute, and applicable committee comments, concluded that "it is not the result—the actual change in visitation—that distinguishes a restriction from a modification; it is the purpose for the change." 394 Ill. App. 3d at 697. "[A] modification looks at the child's best interests directly, while a restriction looks at the suitability of the parent whose visitation would be curtailed." *Id.*

¶ 31 Here, the circuit court explained that the supervised visits were meant to be a temporary, transitional measure to reintroduce Sean and RO-H to each other, with the goal of returning to unsupervised visitation. The court was concerned that, given their prior history together, if Sean and RO-H were abruptly thrown back together after spending several months apart, another incident would occur and the parties would be right back in court. Notably, the court made clear that its order did not necessarily reflect any wrongdoing by Sean. On its own, this might indicate

that the circuit court did not intend to impose a restriction, but we cannot conclude as much where the circuit court itself characterized its order as a restriction ("I believe I can put restrictions on visitation *** based on a best-interest standard."). Moreover, we have been unable to identify any case in which supervised visitation was found to be anything other than a restriction. We therefore hold that the circuit court erred when it imposed a restriction on Sean's parenting time in the absence of a finding of serious endangerment.

¶ 32 B. The Circuit Court's Jurisdiction

¶ 33 Even if the circuit court applied the correct standard and made the required threshold finding of serious endangerment, we furthermore agree it was not free to impose the restriction *sua sponte*. Sean contends that, going into the June 29, 2015 hearing, the only pending petitions were Cathleen's March 2015 emergency motion and Sean's motion to dismiss it. According to Sean, the moment the circuit court granted his motion to dismiss, there was no longer a "justiciable question" before the court, making its subsequent *sua sponte* imposition of a restriction on Sean's parenting time void for lack of jurisdiction.

¶ 34 We initially note that, "[w]ith limited exceptions, circuit courts have 'original jurisdiction of all justiciable matters.' " (Internal quotation marks omitted.) *Suriano v. Lafeber*, 38 Ill. App. 3d 490, 492 (2008) (quoting *Ligon v. Williams*, 264 Ill. App. 3d 701, 707 (1994) (quoting Ill. Const. 1970, art. VI, §9A)). Thus, the circuit court's underlying jurisdiction is not really at issue here. Although the parties discuss in their briefs whether the court *had* jurisdiction, the real issue is whether the court acted within the scope of its authority to exercise that jurisdiction, *i.e.*, whether its jurisdiction was properly invoked. See *Suriano*, 386 Ill. App. 3d at 492 (citing *Ligon*, 264 Ill. App. 3d at 707) ("The court's authority to exercise its jurisdiction and resolve a justiciable question is invoked through the filing of a complaint or petition, pleadings that

function to frame the issues for the trial court and circumscribe the relief the court is empowered to order.").

¶ 35 On appeal, Cathleen proffers two bases for the circuit court's jurisdiction. She first contends the court had continuing jurisdiction to enforce the terms of the February 9, 2015 agreed order, which required both parents to see therapists for a minimum of 18 months. That order, however, makes no mention of therapist-supervised visitation. Cathleen also contends the circuit court had jurisdiction, pursuant to section 608(c)(3) of the Marriage Act, to order "counseling for the child, family counseling for one or more of the parties and the child, or parental education for one or more of the parties" where, *inter alia*, it determined that "one or both of the parties *** violated the joint parenting agreement with regard to conduct affecting or in the presence of the child" (750 ILCS 5/608(c)(3) (West 2012))—something Cathleen argues Sean did when, according to the therapist, he made disparaging remarks about her in RO-H's presence. We agree with Sean, however, that ordering a party to attend counseling is not the same as restricting parenting time to therapist-supervised visitation.

¶ 36 Moreover, even if the agreed order or section 608(c)(3) specifically authorized the circuit court to restrict parenting time to therapist-supervised visitation, its jurisdiction was not invoked where no party asked it to do so. Although Cathleen indicated at the July 8, 2015 hearing that she had a motion ready to file, the record reflects that she did not file a motion, nor did she make an oral motion on the record, at any time between June 29, 2015 when the court dismissed her emergency motion and July 8, 2015 when it imposed the restriction on Sean's parenting time. "Orders that are entered in the absence of a justiciable question properly presented to the court by the parties are void since they result from court action exceeding its jurisdiction." *Suriano*, 386 Ill. App. 3d at 492-93 (holding circuit court's *sua sponte* termination of a joint parenting

agreement void where no petition was pending); see also *In re Custody of Ayala*, 344 Ill. App. 3d 574, 585 (2003) (holding circuit court exceeded its jurisdiction when it modified a custody arrangement when no pleading had been filed requesting such relief). We thus hold that, even if the circuit court applied the correct standard, its order is void where the court exceeded its jurisdiction by imposing a restriction on Sean's parenting time in the absence of a justiciable question.

¶ 37 CONCLUSION

¶ 38 For the reasons stated, we vacate the circuit court's July 8, 2015 order and request that the mandate be issued forthwith. The record does not indicate that any other restrictions or modifications have been imposed on either party's parenting time with RO-H. Therefore, our decision to vacate the July 8, 2015 order results in an automatic and immediate restoration of the parties' custodial rights and the visitation schedule as set forth in the August 23, 2013 Amended Joint Parenting Agreement and Custody Judgment. This matter is remanded for a status hearing to be held no later than 75 days after the entry of this order to determine the parties' compliance with all pending orders of the circuit court.

¶ 39 Order vacated; cause remanded.